

5-1-2003

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Recommended Citation

Lainie M. Dillon, Notes and Comments, *Conundrums with Penumbras: The Right to Privacy Encompasses Non-Gamete Providers Who Create Preembryos with the Intent to Become Parents*, 78 Wash. L. Rev. 625 (2003).

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CONUNDRUMS WITH PENUMBRAS: THE RIGHT TO PRIVACY ENCOMPASSES NON-GAMETE PROVIDERS WHO CREATE PREEMBRYOS WITH THE INTENT TO BECOME PARENTS

Lainie M. C. Dillon

Abstract: To date, five state high courts have resolved disputes over frozen preembryos. These disputes arose during divorce proceedings between couples who had previously used assisted reproduction and cryopreserved excess preembryos. In each case, one spouse wished to have the preembryos destroyed, while the other wanted to be able to use or donate them in the future. The parties in these cases invoked the constitutional right to privacy to argue for dispositional control over the preembryos; two of the five cases were resolved by relying on this right. The constitutional right to privacy protects intimate decisions involving procreation, marriage, and family life. However, when couples use donated sperm or ova to create preembryos, a unique circumstance arises: one spouse—the gamete provider—is genetically related to the preembryos and the other is not. If courts resolve frozen preembryo disputes that involve non-gamete providers based on the constitutional right to privacy, they should find that the constitutional right to privacy encompasses the interests of both gamete and non-gamete providers. Individuals who create preembryos with the intent to become a parent have made an intimate decision involving procreation, marriage, and family life that falls squarely within the right to privacy. In such cases, the couple together made the decision to create a family through the use of assisted reproduction, and the preembryos would not exist but for that joint decision. Therefore, gamete and non-gamete providers should be afforded equal constitutional protection in disputes over frozen preembryos.

Leny and Eva were a married couple eager to have a baby.¹ However, they were unable to achieve pregnancy through traditional means because Eva was born with a uterus but no ovaries. In order to have children, they decided to use Leny's sperm, an anonymous egg donor, and in vitro fertilization (IVF).² They signed up at an infertility clinic, which combined Leny's sperm with the donated eggs, and seventeen preembryos³ resulted. Two preembryos were implanted into Eva's uterus,

1. Hypothetical created by the author.

2. In vitro fertilization is a process by which ova, which are provided by either the intended mother or a donor, are placed in a medium and then fertilized by sperm, which is provided by either the intended father or a donor. See *STEDMAN'S MEDICAL DICTIONARY* 657 (27th ed. 2000). The preembryo that results is then implanted into a uterus of either the intended mother or a surrogate and brought to term. *Id.*

3. "The term 'preembryo' denotes that stage in human development immediately after fertilization occurs. The preembryo 'comes into existence with the first cell division and lasts until the appearance of a single primitive streak, which is the first sign of organ differentiation. This [primitive streak] occurs at about fourteen days of development.'" Donna A. Katz, Note, *My Egg, Your Sperm, Whose Preembryo? A Proposal for Deciding Which Party Receives Custody of Frozen Preembryos*, 5 VA. J. SOC. POL'Y & L. 623, 628–29 n.42 (1998) (alteration in original) (quoting

and the others were cryopreserved⁴ for possible use in the future. Eva gave birth to a healthy child, and they were happy parents. However, their marriage was troubled and the couple divorced.

During the dissolution proceedings, Leny and Eva disagreed about how to dispose of the frozen preembryos. Leny wanted to donate them to an infertile couple, but Eva wanted the opportunity to use the preembryos herself in the future. Because he had a biological connection to the preembryos and Eva did not, Leny asserted that the constitutional right to privacy granted him exclusive control over the preembryos. Eva argued that the right to privacy also sheltered her interests in the preembryos—despite the missing biological connection—and granted her an equal constitutional claim over them.

Only five frozen preembryo disputes between divorcing couples have reached state high courts.⁵ Parties have asserted their constitutional right to privacy in each—usually described in this circumstance as the “right to procreate” or “right not to procreate”—as a basis for determining which spouse will control the disposition of the frozen preembryos.⁶ In four of the five cases, both parties were gamete providers;⁷ they contributed their own cells, or gametes, to the preembryos.⁸ However, it is also common for people to make use of gamete donors and surrogates,⁹ as did the couple in a recent Washington State Supreme Court case, *Litowitz v. Litowitz*.¹⁰ In *Litowitz*, the Washington State Supreme Court stated in dicta that because the wife did not have a biological connection

Clifford Grobstein, *Human Development from Fertilization to Birth*, in *ENCYCLOPEDIA OF BIOETHICS* 847 (Warren Thomas Reich ed., 1995).

4. Cryopreservation is a method of preserving the “viability of excised tissues or organs at extremely low temperatures.” *STEDMAN’S*, *supra* note 2, at 432.

5. See *Litowitz v. Litowitz*, 146 Wash. 2d 514, 48 P.3d 261 (2002); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

6. See *Davis*, 842 S.W.2d at 600 (stating that “[h]ere, the specific individual freedom in dispute is the right to procreate”); see also *J.B.*, 783 A.2d at 711 (stating that the husband had asserted his right to procreate); *Litowitz v. Litowitz*, 102 Wash. App. 934, 943–44, 10 P.3d 1086, 1092–93 (2000) (holding that the husband’s right not to procreate compelled the court to give him complete control over the disposition of the preembryos), *rev’d*, 146 Wash. 2d 514, 48 P.3d 261 (2002).

7. A gamete is “[a]ny germ cell, whether ovum or spermatozoon.” *STEDMAN’S*, *supra* note 2, at 725. A person is a gamete provider if his sperm or her ova are used to create preembryos.

8. See *A.Z.*, 725 N.E.2d at 1053; *J.B.*, 783 A.2d at 709–10; *Kass*, 696 N.E.2d at 175–76; *Davis*, 842 S.W.2d at 589.

9. See JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 8–9 (1994).

10. 146 Wash. 2d 514, 517, 48 P.3d 261, 262 (2002).

Preembryos and the Right to Privacy

to the preembryos, the only way she could have dispositional control over them was through the contract she and her husband signed with the fertility clinic.¹¹ The *Litowitz* court thus implied that, if the constitutional right to privacy had controlled the outcome of the dispute rather than the contract, the husband's procreational rights would have trumped his wife's interests merely because he had a biological connection to the preembryos and she did not.¹²

In resolving frozen preembryo disputes, courts have a choice about what doctrine to apply: they may enforce a contract if one exists,¹³ they may resolve the dispute based on public policy,¹⁴ they may characterize the preembryos as marital property and dispose of them accordingly,¹⁵ or they may apply the right to privacy.¹⁶ If courts apply the constitutional right to privacy and follow the Washington State Supreme Court's dicta regarding non-gamete providers, they will significantly, and unconstitutionally, infringe on non-gamete providers' rights.¹⁷ Instead, if

11. *See id.* at 527, 48 P.3d at 267.

12. *See id.* (stating that because the wife did not have a biological connection to the preembryos, "[a]ny right she may have to the preembryos must be based solely upon contract").

13. *See, e.g., Kass*, 696 N.E.2d at 182; *Litowitz*, 146 Wash. 2d at 533–34, 48 P.3d at 271.

14. *See, e.g., A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000).

15. No state high court has yet applied this approach, but scholars and commentators have recommended it. *See, e.g.,* Brief of Amici Curiae Northwest Women's Law Center, at 11, *Litowitz v. Litowitz*, 102 Wash. App. 934, 10 P.3d 1086 (2000) (No. 70413-9).

16. *See, e.g., J.B. v. M.B.*, 783 A.2d 707, 715–17 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588, 598–605 (Tenn. 1992). Some argue that it is both unnecessary and unwise for courts to apply constitutional rights to resolve preembryo disputes. *See* Brief of Amici Curiae Northwest Women's Law Center, at 11 (No. 70413-9) (stating that "[b]ecause this case can and should be decided by resort to contract or community property law, the constitutional issue, if there is one, should not be reached"). The amicus brief argues that preembryos are marital property and, therefore, subject to contract law or equitable distribution under state law. *See id.* at 5–8. The brief further argues that there are "unknown and almost certainly undesirable consequences" to applying constitutional rights to preembryo disputes because doing so could enable once-anonymous gamete donors to claim that they have procreational rights in preembryos well after their gametic contribution has been made. *Id.* at 13–14. *See also* Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1122–23 (1998) (Arguing that these disputes should not be resolved based on constitutional rights because when each party possesses a personal right of privacy there is a constitutional indeterminacy in which neither one is necessarily protected. "In such areas of constitutional indeterminacy—of tragic choices between competing interests—there is no single necessarily correct constitutional resolution to a controversy."). This Comment does not seek to argue that applying constitutional rights is the most desirable means to resolve preembryo disputes; instead, it seeks to argue that if courts do apply a constitutional rights balancing test to resolve such disputes, they should find that the right to privacy applies equally to gamete and non-gamete providers.

17. While a court may also apply the constitution of its own state, this Comment concerns only the application of the federal constitutional right to privacy.

courts apply constitutional principles in preembryo disputes where one party is a gamete provider and the other is not, they should find that the right to privacy protects both parties' interests in the preembryos. Support for this approach can be found in the analogous area of family law where intent, not biology, determines parentage.¹⁸ As in parentage law, intent should determine whose interests the constitutional right to privacy protects in disputes over frozen preembryos.

This Comment argues that because the constitutional right to privacy broadly protects intimate decisions related to procreation, marriage and family life, a non-gamete provider's intimate decision to create preembryos falls squarely within the zone of privacy protected by the federal Constitution. Part I describes the history of the constitutional right to privacy and its protection of intimate decisions related to procreation, marriage and family life. Part II discusses how courts have thus far applied the right to privacy to disputes over frozen preembryos. Part III provides an overview of parentage law, where intent is used to determine parentage for children born from the use of assisted reproduction.¹⁹ In Part IV, this Comment argues that in deciding whether the right to privacy encompasses the decision to create preembryos, courts should find that the Constitution protects both gamete and non-gamete providers. The creation of preembryos with the intent to become a parent is an intimate decision that is fundamental to procreation and family. Therefore, it falls squarely within the constitutional right to privacy—regardless of a biological connection.

I. THE RIGHT TO PRIVACY PROVIDES BROAD PROTECTION OVER INTIMATE DECISIONS CENTRAL TO PROCREATION, MARRIAGE, AND FAMILY LIFE

The United States Supreme Court, in its constitutional jurisprudence, has consistently applied the right to privacy to protect intimate decisions central to procreation, marriage, and family.²⁰ The Court began to define

18. See *infra* Part III.

19. Assisted reproduction is a general term for the various methods of achieving pregnancy besides sexual intercourse. These include intrauterine insemination, egg donation, embryo donation, in vitro fertilization, and sperm injection. See Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 597 (2002).

20. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (abortion); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (family living arrangements); *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (use of contraception by

the nature of this right in seminal cases prior to its explicit recognition of the right to privacy.²¹ The Court has held that the U.S. Constitution protects both an individual's basic procreative autonomy²² as well as the broader decisions involved with the rearing of one's children.²³ The Court later built on that foundation by explicitly stating that a right to privacy exists in the "penumbras" of the Bill of Rights.²⁴ The Court has since applied this right to strike down laws that unduly restricted marriage,²⁵ contraception,²⁶ family relationships,²⁷ child rearing and education.²⁸

A. *Origins of the Right to Privacy*

The genesis of the constitutional right to privacy can be found in *Skinner v. Oklahoma*,²⁹ *Pierce v. Society of Sisters*³⁰ and *Meyer v. Nebraska*.³¹ In *Skinner*, the U.S. Supreme Court recognized the right to procreate as "one of the basic civil rights of man."³² In striking down a state law that sought to sterilize certain types of criminals, the Court held that the law was unconstitutional in part because "[m]arriage and procreation are fundamental to the very existence and survival of the race."³³

unmarried individuals); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (use of contraception by married couples).

21. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that procreation involves the basic civil rights of man); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (stating that the right to educate is fundamental to marriage and child rearing); *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923) (stating that the concept of liberty includes the right to learn a foreign language).

22. See *Skinner*, 316 U.S. at 541.

23. See *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399–401.

24. See *Griswold*, 381 U.S. at 484–85.

25. See *Loving*, 388 U.S. at 12 (striking down a law that criminalized interracial marriage).

26. See *Griswold*, 381 U.S. at 485–86; *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972).

27. See *Moore v. City of East Cleveland*, 431 U.S. 494, 495–97, 503–06 (1977) (holding that the state cannot prevent a grandmother from living with her grandchildren); see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that there is a "private realm of family life which the state cannot enter").

28. See *Meyer*, 262 U.S. at 402–03 (holding that the city cannot prevent the teaching of foreign languages in elementary schools); *Pierce*, 268 U.S. at 534–35 (holding that the state cannot prevent parents from educating their children in private or parochial schools).

29. 316 U.S. 535 (1942).

30. 268 U.S. 510 (1925).

31. 262 U.S. 390 (1923).

32. See *Skinner*, 316 U.S. at 541.

33. *Id.*

Pierce and *Meyer* were the first Supreme Court cases to broadly characterize the general area of family life as sheltered from state intrusion.³⁴ In *Pierce*, the Court struck down a law requiring children to attend public schools.³⁵ The Court based its decision on a parent's right to educate his or her children in a school of his or her choice, whether public, private or parochial.³⁶ The Court held that this right to choose how to educate one's children stems from the First and Fourteenth Amendments, which protect decisions that are fundamental to marriage and child rearing.³⁷

In *Meyer*, an elementary school teacher taught German to a ten-year-old in violation of a state statute that prohibited teaching foreign languages in elementary schools.³⁸ The Court held that the statute violated the Constitution because the Fourteenth Amendment's concept of liberty protects the right of a teacher to teach and of students to acquire knowledge.³⁹ The Court noted that this protection also encompasses:

[T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁴⁰

Forty years after *Meyer*, in *Griswold v. Connecticut*,⁴¹ the Supreme Court explicitly identified this broad shelter as the right to privacy.⁴²

34. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 743 (1989) (stating that *Pierce* and *Meyer* "may be seen as the true parents of the privacy doctrine" and that today these cases are frequently classified with other privacy cases); see also Rao, *supra* note 16, at 1093 (stating that the right to privacy's earliest origins lie in these two cases); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (stating that "[a] host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), have consistently acknowledged a 'private realm of family life which the state cannot enter'").

35. See *Pierce*, 268 U.S. at 534-35.

36. See *id.* at 535.

37. See *id.* at 534-35.

38. *Meyer*, 262 U.S. at 396-97.

39. See *id.* at 399-401; see also RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 612 (1999) (stating that the Supreme Court determined in *Meyer* that under the Fourteenth Amendment individuals have certain fundamental rights which must be respected by state law, including private decisions related to education).

40. *Meyer*, 262 U.S. at 399.

41. 381 U.S. 479 (1965).

B. The Right to Privacy Protects Intimate Decisions Related to Procreation

The U.S. Constitution does not explicitly state that there is a right to privacy, but “the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy does exist under the Constitution.”⁴³ This right emanates from the penumbras of the specific guarantees in the Bill of Rights, which shelter individuals from government intrusion into speech, religion, assembly, and one’s home and property.⁴⁴ The constitutional right to privacy is also based in the Fourteenth Amendment,⁴⁵ which provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁴⁶

In *Griswold*, the U.S. Supreme Court applied the right to privacy to strike down a Connecticut law making it illegal for a married couple to use “any drug, medicinal article or instrument for the purpose of preventing conception”⁴⁷ The Court viewed the law as an undue intrusion on an intimate decision central to marriage, which the court recognized as “a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”⁴⁸ These guarantees include those found in the First,⁴⁹ Third,⁵⁰ Fourth,⁵¹ Fifth⁵² and Ninth⁵³ Amendments.

42. See *id.* at 484-86; see also Rao, *supra* note 16, at 1095 (stating that *Griswold* was the first case in which the Supreme Court explicitly recognized the right to privacy).

43. *Roe v. Wade*, 410 U.S. 113, 152 (1973); see also Vincent F. Stempel, *Procreative Rights in Assisted Reproductive Technology: Why the Angst?*, 62 ALB. L. REV. 1187, 1193 (1999) (stating that although the Constitution does not specifically refer to a right of privacy, over the years the Supreme Court has developed the doctrine of the right to privacy).

44. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); see also Stempel, *supra* note 43, at 1193 (stating that the Court has identified the penumbras of the specific guarantees in the Bill of Rights as the source of the right to privacy).

45. See *Meyer*, 262 U.S. at 399; *Roe*, 410 U.S. at 163.

46. U.S. CONST. amend. XIV.

47. *Griswold*, 381 U.S. at 480 (quoting CONN. GEN. STAT. § 53-32 (1958 rev.) (repealed 1971)).

48. See *id.* at 484-86; see also ROBERT BLANK & JANNA C. MERRICK, *HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS* 11 (1995) (stating that in *Griswold* the Supreme Court forged a right of marital privacy based on the First Amendment right of association, the Third Amendment prohibition against quartering soldiers in peacetime, the Fourth Amendment prohibition against unreasonable searches and seizures, the Fifth Amendment protection against self-incrimination, and the Ninth Amendment’s vesting of rights not enumerated in the Constitution).

49. See *Griswold*, 381 U.S. at 484 (“The right of association contained in the penumbra of the First Amendment” is one of the rights that defines the zone of privacy.).

While the Court in *Griswold* explicitly expressed a desire to protect decisions that are fundamental to marriage, it also made clear in later cases that the right to privacy extends beyond the marital context.⁵⁴ For example, in *Eisenstadt v. Baird*⁵⁵ the Court struck down a Massachusetts law that made it a crime to distribute contraceptive devices to unmarried persons.⁵⁶ The Court held that the statute was analogously unconstitutional to the Connecticut law in *Griswold*⁵⁷ and concluded that, “whatever the rights of the individual to access . . . contraceptives may be, the rights must be the same for the unmarried and the married alike.”⁵⁸ Procreational rights, the Court stated, are fundamental to every individual: “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child.*”⁵⁹

The Supreme Court further extended the right to privacy in *Roe v. Wade*,⁶⁰ in which the Court held that pregnant women have a right to an abortion under some circumstances.⁶¹ Because the constitutional right to privacy protects the decision of whether and how to create a family, the Court determined that a woman has a right to have an abortion unless there is a sufficiently compelling state interest to prevent it.⁶² Therefore, in *Roe*, the Court struck down a Texas statute that prohibited abortion

50. See *id.* (“The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy.”).

51. See *id.* (“The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’”).

52. See *id.* (“The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.”).

53. See *id.* (citing U.S. CONST. amend IX, which provides: “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”).

54. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

55. 405 U.S. 438 (1972).

56. See *id.* at 454–55.

57. See *id.* at 445–49.

58. *Id.* at 453.

59. *Id.* (emphasis added); see also Stempel, *supra* note 43, at 1193–94 (stating that individual privacy rights were first set forth in *Eisenstadt*).

60. 410 U.S. 113 (1973).

61. See *id.* at 164–65.

62. See *id.* at 154, 163 (holding that a state may not regulate abortion before viability because “[w]ith respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability”); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (stating that “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure”).

except when necessary to save the life of the woman, holding that the right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁶³ Moreover, in a subsequent case addressing abortion rights, *Planned Parenthood v. Casey*,⁶⁴ the Court reaffirmed that the right to privacy protects “the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child.”⁶⁵

C. *The Right to Privacy is a Broad Protection Encompassing the Right to Marry, the Right to Live with One’s Family, and Other Intimate Decisions Central to Highly Personal Relationships*

The U.S. Supreme Court has extended the right to privacy to include situations involving marriage and living arrangements,⁶⁶ and the Court has refused to apply it to situations that do not involve highly personal family decisions.⁶⁷ For example, in *Loving v. Virginia*,⁶⁸ the Court held that a Virginia law criminalizing interracial marriage violated the Equal Protection clause.⁶⁹ In his opinion for the Court, Chief Justice Warren drew on preceding cases stating that the Constitution protected decisions related to marriage.⁷⁰ He explained that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁷¹ Justice Warren went on to specifically note that the right to privacy protects one’s decision of whom to marry because “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”⁷²

63. *Roe*, 410 U.S. at 153.

64. 505 U.S. 833 (1992).

65. *Id.* at 857 (citing *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Moore v. East Cleveland*, 431 U.S. 494 (1977)).

66. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (applying the right to privacy to marriage); *Moore*, 431 U.S. at 503 (applying the right to privacy to living arrangements).

67. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984) (refusing to apply the right to privacy to a men’s club); see also *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 66 n.13 (1973) (stating that because “the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship,” it does not encompass the right to watch obscene movies in public theaters).

68. 388 U.S. 1 (1967).

69. See *id.* at 12.

70. See *id.* at 7 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

71. *Id.* at 12.

72. See *id.* (citing *Skinner*, 316 U.S. at 541).

Familial living arrangements may also fall within the “private realm of family life which the state cannot enter.”⁷³ In *Moore v. City of East Cleveland*,⁷⁴ the Supreme Court struck down a zoning ordinance that limited occupancy of dwelling units to members of a nuclear family, thereby making it a crime for a woman to have her grandchildren live with her.⁷⁵ East Cleveland defended the law by arguing that the right to privacy did not extend beyond the nuclear family, because the Court had thus far only applied it to parent-child relationships.⁷⁶ The Supreme Court rejected this argument, reasoning that the constitutional protection of the “sanctity of the family” includes one’s extended family.⁷⁷ This protection applies broadly to families, the Court explained, because “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”⁷⁸

The Supreme Court has further delineated the scope of the right to privacy by limiting it to highly personal family decisions.⁷⁹ For example, in *Roberts v. United States Jaycees*,⁸⁰ the Court held that members of an all-male organization did not have a constitutional right to exclude women, because the organization was not the type of “highly personal relationship” the Constitution seeks to protect.⁸¹ In its holding, the Court emphasized that constitutional protection extends to those relationships that “attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one’s relatives.”⁸² Thus, the nature and activities of the Jaycees fell outside the zone of privacy protected by the Constitution.⁸³

In sum, the constitutional right to privacy protects intimate decisions central to procreation, marriage and family life. As indicated by Supreme Court jurisprudence, the constitutional right to privacy is very broad. Its protection ranges from the intimate decisions related to creating a

73. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

74. 431 U.S. 494 (1977).

75. See *id.* at 495–97.

76. See *id.* at 500.

77. See *id.* at 503–06.

78. See *id.* at 503–04.

79. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984).

80. 468 U.S. 609 (1984).

81. See *id.* at 618–20 (finding that the Jaycees were the type of organization clearly “outside of the category of relationships worthy of this kind of constitutional protection”).

82. *Id.* at 619 (internal citations omitted).

83. See *id.* at 631 (O’Connor, J., concurring).

family—such as whom to marry and whether to have children—to decisions related to child-rearing and living arrangements.

II. FIVE STATE HIGH COURTS HAVE RESOLVED PREEMBRYO DISPUTES

Five state high courts have examined the issue of who has dispositional control over frozen preembryos upon divorce.⁸⁴ The constitutional right to privacy was raised in each, but only two courts dealt with it directly.⁸⁵ Those courts undertook a two-step process to resolve the disputes: first, they determined whether both spouses had constitutional rights in the preembryos; second, after concluding that they had equal constitutional rights, the courts weighed the spouses' competing interests in the frozen preembryos.⁸⁶ The three courts that avoided the constitutional issues nonetheless acknowledged that preembryo disputes raise constitutional privacy issues.⁸⁷

A. *Courts Have Resolved Preembryo Disputes Based on the Constitutional Right to Privacy*

In disputes over frozen preembryos, parties have consistently asserted their constitutional privacy rights in arguing for dispositional control over the preembryos.⁸⁸ The Supreme Court of Tennessee was the first

84. See *Litowitz v. Litowitz*, 146 Wash. 2d 514, 48 P.3d 261 (2002); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

85. See *J.B.*, 783 A.2d at 717 (stating that the wife's "fundamental right not to procreate" would be "irrevocably extinguished" if a surrogate were allowed to bear her preembryos); *Davis*, 842 S.W.2d at 602 (stating that "however far the protection of procreational autonomy extends, the existence of the right itself dictates that decisional authority rests in the gamete-providers").

86. See *Davis*, 842 S.W.2d at 601, 603–05 (stating that "Mary Sue Davis and Junior Lewis Davis must be seen as entirely equivalent gamete-providers" and then proceeding to balance each party's interests); see also *J.B.*, 783 A.2d at 715–17 (stating that "the claims before us derive, in part, from concepts found in the Federal Constitution and the Constitution of this State" and proceeding to balance each party's interests).

87. See *Kass*, 696 N.E.2d at 179 (resolved based on a contract); *A.Z.*, 725 N.E.2d at 1059 (resolved based on public policy); *Litowitz*, 146 Wash. 2d at 533–34, 48 P.3d at 271 (resolved based on a contract). See also *infra* Part II.B.

88. See *J.B.*, 783 A.2d at 711 (stating that the husband had asserted his right to procreate); *Davis*, 842 S.W.2d at 600 (determining that "[h]ere, the specific individual freedom in dispute is the right to procreate"); *Litowitz v. Litowitz*, 102 Wash. App. 934, 944–45, 10 P.3d 1086, 1092–93 (2002) (holding that David Litowitz, as a progenitor, had a right to procreate), *rev'd*, 146 Wash. 2d 514, 48 P.3d 261 (2002).

state high court to resolve such a dispute.⁸⁹ In *Davis v. Davis*,⁹⁰ a Tennessee couple divorced after previously undergoing in vitro fertilization (IVF) and freezing preembryos for possible use in the future.⁹¹ Because the couple had used the wife's ova and the husband's sperm to create the preembryos, they were both the gamete providers and the intended parents.⁹² Upon divorce, the couple disagreed about what should be done with the preembryos.⁹³ The wife, Mary Sue Davis, wished to have the preembryos donated to an infertile couple, while the husband, Junior Davis, wanted them either to remain frozen or to be discarded.⁹⁴

The Supreme Court of Tennessee engaged in a constitutional rights balancing test to resolve the dispute.⁹⁵ First, the court determined that Mary Sue Davis and Junior Davis both had privacy rights in the preembryos because "the right of procreation is a vital part of an individual's right to privacy."⁹⁶ To reach this conclusion, the court analogized control over preembryos to those acts the U.S. Supreme Court has explicitly stated fall under the right to privacy, such as the right to use contraception and to have an abortion.⁹⁷ Because the court determined that both spouses had equal constitutional rights in the preembryos, its second step was to compare their competing interests in them.⁹⁸ The *Davis* court reasoned that Mary Sue's interest in the preembryos was the "burden of knowing that the lengthy IVF procedures she underwent were futile."⁹⁹ The court based Junior's interests in the preembryos on his strong desire to avoid unwanted fatherhood.¹⁰⁰ The

89. See Stempel, *supra* note 43, at 1192 (stating that *Davis* was the first case to deal directly with the issue of frozen preembryos).

90. 842 S.W.2d 588 (Tenn. 1992).

91. See *id.* at 589.

92. See *id.* at 591-92.

93. See *id.* at 589.

94. See *id.* at 589-90.

95. See *id.* at 598-605.

96. See *id.* at 600.

97. See *id.* at 600-03 (citing *Buck v. Bell*, 274 U.S. 200 (1927); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977)).

98. See *Davis*, 842 S.W.2d at 603-04.

99. See *id.* at 604.

100. Junior Davis had been a child of divorce and was "vehemently opposed" to becoming the father to a child that would not live with both parents. See *id.* at 603-04. His concerns included both

court concluded that Junior Davis's interests were more compelling, and, therefore, the preembryos were destroyed.¹⁰¹ Notably, the Supreme Court of Tennessee also stated that Mary Sue's interests would have been stronger if she had wanted to use the preembryos for herself and if they were the only means by which she could become a parent.¹⁰²

In *J.B. v. M.B.*,¹⁰³ the Supreme Court of New Jersey echoed the Tennessee court's determination that individuals have constitutional rights in their frozen preembryos.¹⁰⁴ In *J.B.*, a New Jersey couple divorced after previously undergoing IVF and freezing preembryos.¹⁰⁵ As in *Davis*, both parties were gamete providers¹⁰⁶ who disagreed about what should be done with the preembryos; the husband wanted to donate them to an infertile couple, while the wife wanted them destroyed.¹⁰⁷ Both parties argued that they had a constitutional right, rooted in the right to privacy, to control the disposition of the preembryos.¹⁰⁸ Like the *Davis* court, the Supreme Court of New Jersey engaged in a constitutional rights balancing test to resolve the dispute.¹⁰⁹ The court first considered whether the Constitution protected both spouses' interests, and, as in *Davis*, the court held that the right to privacy protected both the husband and wife's interests in the preembryos.¹¹⁰ Next, the court compared the parties' competing interests and concluded that the wife's procreational rights would be "irrevocably extinguished" if her husband was allowed to have the preembryos implanted in another woman against the wife's wishes.¹¹¹ Therefore, the *J.B.* court ordered the preembryos destroyed.¹¹²

the suffering he perceived the child would endure as well as the burdens that would be placed on him as a parent. *Id.*

101. *See id.* at 604–05.

102. *See id.* at 604.

103. 783 A.2d 707 (N.Y. 2001).

104. *See id.* at 715–17.

105. *See id.* at 710.

106. *See id.* at 708–10.

107. *See id.* at 710.

108. *See id.* at 712.

109. *See id.* at 715–16 (reasoning that the decisions in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965), and *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) "provide a framework within which disputes over the disposition of preembryos can be resolved").

110. *See id.* at 715–17.

111. *See id.* at 717.

112. *See id.* at 720.

In both *Davis* and *J.B.*, the courts made it clear that the parties' constitutional rights in the preembryos were equal.¹¹³ The Tennessee court explicitly stated that, "[a]s they stand on the brink of potential parenthood, Mary Sue Davis and Junior Lewis Davis must be seen as entirely equivalent gamete-providers."¹¹⁴ Therefore, under the constitutional right to privacy, both individuals had an equal right to determine the fate of the preembryos, because neither spouse had an inherently more compelling constitutional right than the other.¹¹⁵ Consequently, the courts proceeded to the second step of balancing the parties' competing interests.¹¹⁶

B. Courts That Have Resolved Preembryo Disputes Without Relying on the Constitution Have Nonetheless Indicated That Such Disputes Implicate the Constitutional Right to Privacy

Even when courts have resolved preembryo disputes without relying on the constitutional right to privacy, they have acknowledged that the creation of preembryos implicates the right.¹¹⁷ For example, in *Kass v. Kass*,¹¹⁸ New York's highest court enforced a dispositional agreement the divorcing couple had made at the time they began the IVF procedure.¹¹⁹ The contract stated that if the couple was ever unable to mutually agree about the disposition of the preembryos, the IVF clinic should donate them to research.¹²⁰ Though the court decided the case based on the contract, it also noted that the dispositional control of preembryos is "a quintessentially personal, private decision."¹²¹

113. See *Davis v. Davis*, 842 S.W.2d 588, 501 (Tenn. 1992); *J.B. v. M.B.*, 783 A.2d 707, 716 (N.J. 2001).

114. See *Davis*, 842 S.W.2d at 601.

115. *Id.* at 603.

116. See *id.* (stating that the court would consider both spouses' interests by examining "the positions of the parties, the significance of their interests, and the relative burdens that w[ould] be imposed by differing resolutions"); see also *J.B.*, 783 A.2d at 716-17.

117. See *Litowitz v. Litowitz*, 146 Wash. 2d 514, 527, 48 P.3d 261, 267 (2002); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000); *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

118. 696 N.E.2d 174 (1998).

119. See *id.* at 182.

120. See *id.* at 176-77 (noting the contract specifically stated that "[i]n the event that we . . . are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct [that] . . . [o]ur frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program").

121. *Id.* at 180.

Preembryos and the Right to Privacy

In *A.Z. v. B.Z.*,¹²² the Supreme Judicial Court of Massachusetts similarly recognized the privacy interest that individuals have in their preembryos.¹²³ In *A.Z.*, the court refused to enforce a contract between a divorcing couple on the basis that it violated Massachusetts public policy.¹²⁴ The agreement stated that in the event that the couple failed to mutually agree about the disposition of the preembryos, the wife would have full control over them.¹²⁵ The court held that public policy prevented it from enforcing the contract, because the husband had changed his mind about becoming a parent.¹²⁶ This decision, the Supreme Judicial Court of Massachusetts stated, “enhances the ‘freedom of personal choice in matters of marriage and family life.’”¹²⁷

The Washington State Supreme Court confronted this issue in *Litowitz v. Litowitz*,¹²⁸ although in somewhat different circumstances. In *Litowitz*, a couple created preembryos during their marriage by using the sperm of the husband, David Litowitz, and ova from an anonymous egg donor.¹²⁹ Thus, unlike the other preembryo disputes, the wife, Becky Litowitz, was a non-gamete provider.¹³⁰ Before the couple divorced, they had a preembryo implanted into a surrogate,¹³¹ and they cryopreserved the excess preembryos for possible future use.¹³² Upon divorce, David Litowitz wanted the remaining preembryos destroyed or donated to an infertile couple, while Becky Litowitz wanted them implanted in a surrogate and brought to term.¹³³

While the Washington State Supreme Court resolved the dispute on contract grounds,¹³⁴ it stated in dicta that it would not extend the right to privacy to non-gamete providers.¹³⁵ The court reasoned that because

122. 725 N.E.2d 1051 (Mass. 2000).

123. *See id.* at 1059.

124. *See id.* at 1056.

125. *See id.* at 1054 (the agreement stated that if the husband and wife “[s]hould become separated, [they] both agree[d] to have the embryo(s) . . . return[ed] to [the] wife for implant”).

126. *See id.* at 1059.

127. *See id.* (quoting *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

128. 146 Wash. 2d 514, 48 P.3d 261 (2002).

129. *See id.* at 517, 48 P.3d at 262.

130. *See id.*

131. *See id.*

132. *See id.* at 517, 48 P.3d at 262–63.

133. *See id.* at 520, 48 P.3d at 264.

134. *See id.* at 533–34, 48 P.3d at 271.

135. *See id.* at 527, 48 P.3d at 267.

Becky Litowitz did not have a biological connection to the preembryos, “[a]ny right she may have to the preembryos must be based solely upon contract.”¹³⁶ In other words, the Washington court suggested that when an individual decides to have a child through IVF, his or her rights and obligations to those preembryos stem solely from contractual or biological grounds.¹³⁷ Significantly, by the time of the divorce, Becky and David Litowitz’s child had been born.¹³⁸ Becky Litowitz’s legal status as the child’s mother was never questioned, despite her lack of a biological connection and the use of an egg donor and surrogate. Nevertheless, the Washington State Supreme Court stated that “any” right to the preembryos would be based “solely” upon contract and, thus, that Becky Litowitz did not possess a constitutionally protected privacy interest in the preembryos.

In sum, the constitutional right to privacy consistently arises in disputes over the fate of frozen preembryos. To date, two state high courts have applied constitutional rights to resolve such disputes.¹³⁹ Significantly, even courts that resolved the disputes on non-constitutional grounds agreed that preembryo disputes implicate privacy rights. However, in one case, *Litowitz*, a court suggested in dicta that non-gamete providers do not have a constitutional right to control the disposition of their preembryos. If courts follow this approach in future cases, non-gamete providers will be denied privacy rights in preembryos solely because they lack a biological connection.

III. FOR CHILDREN BORN FROM ASSISTED REPRODUCTION, INTENT—NOT BIOLOGY—DEFINES LEGAL PARENTAGE

Children born from the use of assisted reproduction are often not biologically related to their parents; they may be born from processes that involve sperm donation, egg donation, surrogacy, or a combination thereof.¹⁴⁰ Because biological connections do not necessarily indicate who the parents of such children are,¹⁴¹ the law increasingly looks to the

136. *See id.*

137. *See id.*

138. *See id.* at 517, 48 P.3d at 262.

139. *See Davis v. Davis*, 842 S.W.2d 588, 598–605 (Tenn. 1992); *J.B. v. M.B.*, 783 A.2d 707, 715–17 (N.J. 2001).

140. *See* ROBERTSON, *supra* note 9.

141. *See* JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 174 (1997) (stating that it is now recognized that biological connections do not securely anchor society’s understanding of the family).

intent of the participants in the reproductive process to determine their legal rights.¹⁴² The Uniform Parentage Act of 2000 (UPA) applies the intent doctrine to determine the rights of individuals who use assisted reproduction.¹⁴³ Under this doctrine, those who intend to create a family are the legal parents to children that result,¹⁴⁴ while those who do not intend to create a family—such as anonymous gamete donors—do not have parental rights.¹⁴⁵ Case law also uses intent, not biology, to determine parentage.¹⁴⁶ In some cases, courts have required individuals with no biological connection to a child to uphold their parental obligations because they intended to create a family.¹⁴⁷ In other cases, courts have denied parentage rights to individuals with a biological connection to a child because they lacked the initial intent to create a family.¹⁴⁸

A. *The Uniform Parentage Act Calls for the Use of Intent to Determine Parentage of Children Born From Assisted Reproduction*

Children born from the use of egg or sperm donation are not biologically related to one or both parents; therefore, intent has emerged as the primary analysis for determining legal parenthood.¹⁴⁹ The UPA,

142. See UNIF. PARENTAGE ACT §§ 702 and 703, 9B U.L.A. 355–56 (2000) (stating that a gamete donor is not a parent to a child that is conceived by means of assisted reproduction and that a husband is the father of a child resulting from assisted reproduction if he consented to the use of assisted reproduction); see also *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293–94 (Cal. Ct. App. 1998) (determining that the intended parents are the legal parents to a child born from an egg donor, sperm donor, and surrogate mother); *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (granting maternity rights to the gamete-provider mother over the surrogate mother because the preembryos would not exist but for the gamete-provider mother's intent to have children); *McDonald v. McDonald*, 608 N.Y.S.2d 477, 480 (N.Y. App. Div. 1994) (granting maternity rights to the intended mother, who was also the gestational mother).

143. See UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (stating that a sperm or egg donor is not the parent of a child conceived by assisted reproduction).

144. See *id.* at § 703, 9B U.L.A. 356 (stating that if a husband consents to assisted reproduction by his wife he is the father of a resulting child, regardless of whether he provided sperm or not).

145. See *id.* at § 702, 9B U.L.A. 355 (stating that a sperm or egg donor is not the parent of a child conceived by assisted reproduction).

146. See, e.g., *Buzzanca*, 72 Cal. Rptr. 2d at 294; *Johnson*, 851 P.2d at 782–87; *McDonald*, 608 N.Y.S.2d at 480.

147. See *infra* Part III.B.

148. See *infra* Part III.B.

149. See *TURKINGTON & ALLEN*, *supra* note 39, at 410–11. The UPA legitimizes the use of assisted reproduction by stating that it is among a handful of ways that legal parenthood may be established. See UNIF. PARENTAGE ACT, § 201, 9B U.L.A. 309 (2000). Under the UPA, the other

declares that in the context of assisted reproduction, intent, not biology, is determinative of one's legal status as a parent.¹⁵⁰ Nineteen states have fully adopted the UPA, while many others have partially adopted it.¹⁵¹ For both egg and sperm donation, the UPA states that the intended parents are the legal parents: "[i]f a husband provides sperm for, or consents to, assisted reproduction by his wife . . . he is the father of a resulting child."¹⁵² Conversely, a donor is *not* a parent of a child conceived by means of assisted reproduction.¹⁵³ Thus, intent determines parentage in the context of assisted reproduction.

B. Courts Also Rely on Intent to Resolve Parentage Disputes

Case law resolving parentage disputes is in line with the UPA's approach.¹⁵⁴ Courts base parentage rights for children born from assisted reproduction on intent: specifically, whether the individual acted to bring about the birth of a child with the intent to raise it as his or her own.¹⁵⁵ For example, in *In re Marriage of Buzzanca*¹⁵⁶ a child, Jaycee, was born with five potential parents: an anonymous egg donor, an anonymous sperm donor, a gestational mother, and the husband and wife who intended to be the parents.¹⁵⁷ Upon divorce, which occurred shortly before the child was born, the intended father claimed that he did not

ways to establish parenthood are: birth, an un rebutted presumption of paternity, gestational agreement, adoption, acknowledgment, and adjudication. *See id.*

150. *See* UNIF. PARENTAGE ACT § 7, 9B U.L.A. 354–59.

151. *See id.* at Prefatory Note, 9B U.L.A. 296–98 (stating that the previous version had been fully adopted in nineteen states and partially adopted in many additional states).

152. *See id.* at § 703, 9B U.L.A. 356.

153. *See id.* at § 702, 9B U.L.A. 355.

154. *See, e.g., In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293–94 (Cal. Ct. App. 1998); *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993); *McDonald v. McDonald*, 608 N.Y.S.2d 477, 480 (N.Y. App. Div. 1994).

155. *See* Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R.5th 567 (2000); *see also* Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (stating that "[w]ithin the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood"); *Buzzanca*, 72 Cal. Rptr. 2d at 293–94 (determining that the intended parents are the legal parents to child born from egg donor, sperm donor, and surrogate mother); *Johnson*, 851 P.2d at 787; *McDonald*, 608 N.Y.S.2d at 480 (granting maternity rights to the intended mother, who was also the gestational mother).

156. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

157. *See id.* at 282.

have any legal obligation to pay child support.¹⁵⁸ He based this claim on the fact that he was not biologically related to Jaycee.¹⁵⁹ A California appeals court rejected the husband's argument and held that he was obligated to pay child support because of his intent to create and parent a child.¹⁶⁰ Division Four of the California Court of Appeal acknowledged that it was an undisputed fact that Jaycee would not have been born but for the intended parents' agreement to implant a fertilized egg in a surrogate.¹⁶¹ Furthermore, the court held that the husband's intent and affirmative act of proceeding with the surrogacy agreement were conclusive "parenthood" under the common law doctrine of estoppel.¹⁶² The California court stated a clear rule: when "a child is procreated because a medical procedure was initiated and consented to by intended parents," the intended parents are the legal parents of the child.¹⁶³

Similarly, in *Johnson v. Calvert*,¹⁶⁴ the California Supreme Court relied on the intent of the parties to resolve a maternity dispute.¹⁶⁵ In *Johnson*, a husband and wife contracted with a surrogate mother to gestate a child on their behalf.¹⁶⁶ The surrogate mother asserted maternity rights based on her biological connection to the child formed through gestation and birth, despite the fact that the husband and wife provided both gametes and were therefore the genetic parents of the child.¹⁶⁷ The surrogate mother claimed that her biological connection gave her a constitutional right to be the legal mother to the child.¹⁶⁸ The California Supreme Court resolved the maternity dispute by relying on the intent of the parties when they undertook the procreational process.¹⁶⁹ The court

158. *See id.*

159. *See id.*

160. *See id.* at 292, 294.

161. *See* 2 WEST GROUP, PRACTICER TREATISE SERIES, HEALTH LAW 406-07 (2d ed. 2000).

162. *See id.*

163. *See Buzzanca*, 72 Cal. Rptr. 2d at 282.

164. 851 P.2d 776 (Cal. 1993).

165. *See id.* at 782; *see also* DOLGIN, *supra* note 141, at 185 (stating that the *Johnson* court used intent to represent a "a symbol of familial connection, as a new alternative to terms such as blood and genes, which constitute the connection between generations").

166. *See Johnson*, 851 P.2d at 777.

167. *See id.* at 778.

168. *See id.* at 785.

169. *See id.* at 782; *see also In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 288 (Cal. Ct. App. 1998) (stating that in *Johnson* "motherhood could have been 'established' in either of two women under the Act, and the tie [was] broken by noting the intent to parent as expressed in the surrogacy contract").

denied maternity rights to the surrogate mother¹⁷⁰ despite acknowledging that giving birth to the child gave her a biological connection sufficient for maternity under California law.¹⁷¹ The court based its decision on the reasoning that “[a] woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices.”¹⁷² The court held that the wife was the legal mother because “from the outset [she had] intended to be the child’s mother”¹⁷³ and because the child would not have been born *but for* the couple’s desire and acts to create a family.¹⁷⁴ The California Supreme Court focused on the fact that the couple “affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization.”¹⁷⁵

In *McDonald v. McDonald*,¹⁷⁶ a New York appellate court also used intent to grant maternity rights to a woman not genetically related to her children.¹⁷⁷ In *McDonald*, a husband argued that his wife did not have maternity rights to their children because she was not their genetic mother.¹⁷⁸ The couple had combined donor eggs with the husband’s sperm to create the preembryos, which were implanted in the wife and resulted in her giving birth to twins.¹⁷⁹ Upon divorce, the husband argued that the children should either be found illegitimate or “genetically and legally plaintiff’s” so that his wife would be denied parentage rights.¹⁸⁰ In rejecting the husband’s argument, the court explicitly adopted the reasoning used in *Johnson v. Calvert* to hold that the wife was the legal mother of the twins because—despite her missing genetic connection—she had the necessary intent to create a family.¹⁸¹

170. See *Johnson*, 851 P.2d at 787.

171. See *id.* at 781 (stating that because there was “undisputed evidence that [the surrogate mother], not [the gamete provider], gave birth to the child . . . [b]oth women thus have adduced evidence of a mother and child relationship as contemplated by the Act”) (citing CAL. CIV. CODE §§ 7003, 7004, 7015 (West 1970); CAL. EVID. CODE, §§ 621, 892 (West 1966)).

172. *Id.*

173. See *id.* at 782.

174. See *id.*

175. See *id.*

176. 608 N.Y.S.2d 477 (N.Y. App. Div. 1994).

177. See *id.* at 480.

178. See *id.* at 479.

179. See *id.* at 478.

180. See *id.*

181. See *id.* at 480 (stating that “in the instant ‘egg donation’ case, the wife, who is the gestational mother, is the natural mother of the children”).

In sum, intent, rather than biological connections, determines parentage for children born from the use of assisted reproduction. Both the Uniform Parentage Act and case law have adopted this approach. Therefore, individuals without a biological connection may nonetheless have parentage obligations, and individuals who do have a biological connection may nonetheless be denied parentage rights.

IV. THE CREATION OF PREEMBRYOS IS AN INTIMATE DECISION ABOUT WHETHER TO HAVE CHILDREN AND, AS SUCH, FALLS SQUARELY WITHIN THE ZONE OF PRIVACY PROTECTED BY THE U.S. CONSTITUTION

The constitutional right to privacy broadly protects intimate decisions central to procreation, marriage and family life.¹⁸² The decision to create preembryos in order to have children is as intimate and central to family life as procreational decisions involving contraception and abortion. As such, it falls squarely within the zone of privacy protected by the U.S. Constitution.¹⁸³ Because both gamete and non-gamete providers using assisted reproduction have made the intimate decision to create a family, the right to privacy's broad shield over decisions related to procreation, marriage and family life should protect them *both*. Thus, courts determining dispositional control over preembryos should consider the constitutional interests of both gamete and non-gamete providers equally. Courts have erred in this consideration to the extent that they have chained these interests to a biological connection.¹⁸⁴

Rather than looking to biology to find that one party has a privacy interest in the preembryos and the other does not, courts should look to the *intent* of the parties who participated in the creation of the preembryos. Intent is a well-established method for determining parentage in family law¹⁸⁵ and provides a useful analogy to resolving preembryo disputes. In family law, a biological connection is not required to establish parentage—what matters is the intent of the parties to become parents.¹⁸⁶ Similarly, in the preembryo context, parties who intend to create a family have each made the intimate decision to

182. See *supra* Part I.

183. See, e.g., *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

184. See, e.g., *Litowitz v. Litowitz*, 146 Wash. 2d 514, 527, 48 P.3d 261, 267 (2002).

185. See *supra* Part III.

186. See *supra* Part III.

procreate and, therefore, should be equally protected by the constitutional right to privacy.

A. Courts Have Properly Applied Privacy Rights in Preembryo Disputes, Except to the Extent They Have Made the Right to Privacy Dependent Upon Biology

In each of the five cases decided by state high courts, disputes over frozen preembryos have implicated the right to privacy.¹⁸⁷ In two of those cases, *Davis v. Davis* and *J.B. v. M.B.*, the courts explicitly applied the constitutional right to privacy and balanced the parties' interests.¹⁸⁸ The courts in *Davis* and *J.B.* were correct in so far as they recognized that individuals have a privacy interest in their preembryos.¹⁸⁹ But, they were incorrect to the extent that they tied the right to privacy to a biological connection.¹⁹⁰

Furthermore, the Washington State Supreme Court incorrectly stated in *Litowitz v. Litowitz* that the right to privacy requires a biological connection in order to protect one's constitutional interest in preembryos.¹⁹¹ The court failed to recognize the intimate nature of that couple's decision—made within the highly personal relationship of their marriage—to create preembryos in order to become parents. If courts add a biological requirement to the right to privacy, they will fail to recognize that the use of assisted reproduction to create preembryos in order to have children is an intimate decision that falls squarely within the zone of privacy protected by the U.S. Constitution.

187. See *Litowitz*, 48 P.3d 261, 146 Wash. 2d 514; *J.B.*, 783 A.2d 707; *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis*, 842 S.W.2d 588.

188. See *J.B.*, 783 A.2d at 715–17; *Davis*, 842 S.W.2d at 603–04.

189. See *J.B.*, 783 A.2d at 715–17; *Davis*, 842 S.W.2d at 603.

190. See, e.g., *Davis*, 842 S.W.2d at 602 (stating that “decisional authority rests in the gamete-providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status” because “no other person or entity has an interest sufficient to permit interference with the gamete-providers’ decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do”).

191. See *Litowitz*, 146 Wash. 2d at 527, 48 P.3d at 267.

B. *The Right to Privacy Protects the Extremely Personal Decision of Whether to Create Preembryos in Order to Have Children*

The right to privacy is sufficiently broad to encompass the intimate decision to create a family via assisted reproduction.¹⁹² The Washington State Supreme Court's dicta in *Litowitz* to the contrary utterly fails to recognize the breadth of the right to privacy. The U.S. Supreme Court acknowledged the broad scope of the right to privacy in *Eisenstadt v. Baird*, where the Court concluded that the right to privacy protected an individual's decision to use contraception.¹⁹³ The Court held that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the *decision whether to bear or beget a child*."¹⁹⁴ The Court has also held that the right to privacy is so broad that it shields a woman's decision to terminate her pregnancy.¹⁹⁵ Yet, the right to privacy protects much more than the decision to have a child.¹⁹⁶ In *Loving v. Virginia*, the Court held that the right to privacy shielded an individual's decision of whom to marry.¹⁹⁷ In *Moore v. City of East Cleveland*, the Court extended the right to privacy to protect a person's decision to live with members of her extended family.¹⁹⁸ Despite this, the Washington State Supreme Court has suggested in dicta that the right to privacy does not encompass the fruits of a couple's decision to combine sperm and donor eggs in an effort to create a family.¹⁹⁹ This flatly contradicts the recognized historic breadth of the right to privacy and, if followed, would render meaningless eighty years of U.S. Supreme Court jurisprudence.

Rather than depending on biology, courts should look to the intimate nature of the decision to create a family by using assisted reproduction and determine that the Constitution protects the interests of both gamete and non-gamete providers. As the U.S. Supreme Court determined in *Roberts v. United States Jaycees*, the Constitution protects highly

192. See *supra* Part I.

193. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

194. See *id.* (emphasis added and omitted).

195. See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

196. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (extending the right to privacy to the decision of whom to marry); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (extending the right to privacy to family living arrangements).

197. See *Loving*, 388 U.S. at 12.

198. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

199. See *Litowitz v. Litowitz*, 146 Wash. 2d 514, 527, 48 P.3d 261, 267 (2002).

personal relationships that “attend the creation and sustenance of a family.”²⁰⁰ The creation of preembryos using assisted reproduction is a highly personal one that attends the creation and sustenance of a family and is, therefore, protected by the Constitution. Courts following the dicta in *Litowitz* would inappropriately make the constitutional right to privacy dependent on biology in contradiction of well-established Supreme Court jurisprudence. Instead, courts should rely on an individual’s intent to find that the constitutional right to privacy protects both gamete and non-gamete providers’ interests when they create preembryos with the intent to become a parent.

C. *Courts Should Look to the Intent of the Parties at the Time They Created the Preembryos*

Intent is the most practical and fair method for determining privacy rights. Courts faced with resolving preembryo disputes should analogize the issue to family law, where parentage disputes are determined by intent.²⁰¹ In parentage disputes, biological connections are often legally meaningless. For example, individuals with absolutely no biological connection are forced to uphold their parental responsibilities if they intended to become a parent when they used assisted reproduction,²⁰² while individuals who do have a biological connection are denied any parenting rights whatsoever if they lacked the initial intent to become a parent.²⁰³ In *In re Marriage of Buzzanca*, a California court forced parentage obligations on a man for a child with whom he had no biological connection, because that child would not have been born but for the man’s intent to create a family using donor sperm, donor eggs and a surrogate.²⁰⁴ In *Johnson v. Calvert*, the California Supreme Court denied parentage rights to a surrogate mother because she lacked the

200. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984) (internal citations omitted).

201. See *supra* Part III.

202. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293–94 (Cal. Ct. App. 1998) (applying the intent doctrine to force parental obligations on a man with no biological connection to a child); see also UNIF. PARENTAGE ACT, § 703, 9B U.L.A. 356 (2000) (stating that a husband who consented to assisted reproduction by his wife is the father of a resulting child even if he did not provide the sperm).

203. See *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993) (using the intent doctrine to deny parentage rights to the surrogate mother and grant them to the intended mother); see also UNIF. PARENTAGE ACT, § 702, 9B U.L.A. 355 (2000) (stating that a gamete donor is not a parent to a child conceived by assisted reproduction).

204. See *Buzzanca*, 72 Cal. Rptr. 2d at 293–94.

intent to become a parent.²⁰⁵ Despite having gestated and given birth to the child, the surrogate mother's biological connection was insufficient to overcome the intended mother's right to parentage²⁰⁶ because the child would not exist "[b]ut for [the] acted-on intent[]" of the intended mother to become a parent.²⁰⁷ This same approach was applied to the egg donor situation in *McDonald v. McDonald*, where a New York court granted parentage rights to the intended mother despite her ex-husband's argument that because she did not have a genetic connection to the children she should not have parentage rights.²⁰⁸

Similarly, courts should look to the *intent* of the parties in preembryo disputes to determine whether they made the intimate decision to create a family that falls within the zone of privacy protected by the U.S. Constitution. In *Buzzanca*, *Johnson*, and *McDonald*, courts looked to the intent of the parties to determine their parentage rights and obligations. Preembryo disputes likewise deal with individuals who had the intent to become parents at the time they began the process of assisted reproduction. Therefore, courts should look to the intent of these individuals when determining whether they have privacy interests in their preembryos. If both parties had the intent to become parents when they created the preembryos, then the constitutional right to privacy must apply equally to them both. A biological connection should not steal the shade provided by the umbrella of the constitutional right to privacy.

D. Deciding Preembryo Cases Based on Constitutional Privacy Interests Permits Courts to Fairly Balance Parties' Competing Interests

If courts choose to apply the constitutional right to privacy, they should hold that it encompasses the interests of both gamete and non-gamete providers. As illustrated by the constitutional balancing test used in *Davis v. Davis* and *J.B. v. M.B.*, this threshold determination enables courts to weigh the relevant interests of both parties before making a final decision about who has dispositional control over the preembryos.²⁰⁹ When courts determine that both parties have

205. See *Johnson*, 851 P.2d at 782.

206. See *id.*

207. See *id.*

208. See *McDonald v. McDonald*, 608 N.Y.S.2d 477, 480 (N.Y. App. Div. 1994).

209. See *J.B. v. M.B.*, 783 A.2d 707, 715–17 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588, 603–04 (Tenn. 1992).

constitutional rights, that does not determine which party ultimately prevails; it merely ensures that the interests of both parties will be considered. Significantly, when courts grant one party dispositional control over preembryos, it often enables that party to prevent his or her ex-spouse from using the preembryos against his or her wishes.²¹⁰ Non-gamete providers should have this same opportunity to prevent the unfair disposition of preembryos they helped create.

The importance of granting constitutional rights to both gamete and non-gamete providers can be illustrated by looking again at the hypothetical with Leny and Eva.²¹¹ For example, assume Eva embraced the particular moral view that it would be unethical to destroy the preembryos or to donate them to scientific research.²¹² She and Leny discussed this issue in detail prior to engaging the IVF clinic. They agreed that once they had created their family they would donate any excess preembryos to an infertile couple (though they did not sign a contract with the IVF clinic). The preembryos would never have been created had Eva and Leny not agreed on this point, because Eva had made clear that she would not participate in the creation of the preembryos if there was a chance they would ever be destroyed. If, upon divorce, Leny wishes to have the preembryos destroyed, that desire should not be the only interest the court hears. The court should also consider Eva's interests, as she too participated in the intimate and highly personal decision to have the preembryos created. The constitutional right to privacy must protect both Leny and Eva. For a court to hold otherwise would contradict years of U.S. Supreme Court jurisprudence establishing that the constitutional right to privacy is a broad shield protecting intimate decisions central to procreation, marriage and family life.

V. CONCLUSION

In disputes over frozen preembryos, it is inevitable that parties will invoke the constitutional right to privacy to argue that they should have dispositional control over the preembryos. The right to privacy protects

210. See *supra* Part II.

211. See *supra* notes 1–4 and accompanying text.

212. See, e.g., *J.B.*, 783 A.2d at 710–11 for a similar example. In *J.B.*, the husband argued that “as a Catholic,” he would not have agreed to participate in the creation of preembryos that would eventually be destroyed and that he and his wife had agreed “that no matter what happened the eggs would be either utilized by us or by other infertile couples.” See *id.* at 710.

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intimate decisions central to procreation, marriage and family life. Non-gamete providers who decide to create preembryos with the intent to become a parent have made an intimate decision falling squarely within the constitutional right to privacy. Therefore, if courts choose to apply the constitutional right to privacy to resolve preembryo disputes, they should find that the right to privacy encompasses both gamete and non-gamete providers. In such cases, the couple made the decision to create a family through the use of assisted reproduction together, and the preembryos would not exist but for that joint decision. Consequently, courts should consider the interests of both gamete providers and non-gamete providers who create preembryos with the intent to become parents and refrain from granting dispositional control based solely on a biological connection.

